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No. 85-2150

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

CLIFFORD BRANTLEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WALLACE and TINKLER
ROBERT B. WALLACE
PAUL E. TINKLER
129 BROAD STREET
CHARLESTON, SC 29401
(803) 722-8313

ATTORNEYS FOR PETITIONER

4912

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123 BROAD STREET
CHARLESTON, SC 29401
(803) 723-8411

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

IN A PROSECUTION FOR CONSPIRACY TO VIOLATE 18 U.S.C. § 1951 (THE HOBBS ACT), MUST THE GOVERNMENT PROVE THAT THE PETITIONER'S CONDUCT HAD AN ACTUAL OR POTENTIAL ADVERSE IMPACT ON INTERSTATE COMMERCE IN ORDER TO ESTABLISH FEDERAL JURISDICTION?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner hereby prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on April 2, 1986.

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OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals dated November 7, 1985 and the subsequent denial of the Petition for Rehearing on April 2, 1986 in Case Number 84-5233(L) constitute the judgment herein sought to be reviewed. The opinion of the Court of Appeals and that court's order denying the Petition for Rehearing are reproduced and in the Appendix.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on November 7, 1985. The Petitioner's Petition for Rehearing was denied on April 2, 1986.

OPINIONS BELOW

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JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on November 7, 1985. The petitioner's petition for Rehearing was denied on April 2, 1986.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1951 (The Hobbs Act):

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section -
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
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> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or

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(3) The term "commerce" means commerce within the District of Columbia, or any Territory or

> Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Clifford Brantley, Sheriff of Jasper County, South Carolina, and Henry E. Ingram, Jr., a Hilton Head businessman, were indicted in a two count indictment filed March 21, 1984. The first count alleged a conspiracy to violate 18 U.S.C. § 1951 (The Hobbs Act); the second count alleged a substantive violation of The Hobbs Act. The essence of the allegations was that Ingram and Brantley conspired together and that Brantley, abetted by Ingram, extorted a total of $2,300 in cash from Theodore Domine, an undercover F.B.I. agent,

possession of the United States; all commerce between any point in a State, Territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Clifford Brantley, Sheriff of Jasper County, South Carolina, and Henry K. Ingram, Jr., a citizen and businessman, were indicted in a two count indictment filed March 21, 1952. The first count alleged a conspiracy to violate 18 U.S.C. § 1951 (the Hobbs Act); the second count alleged a substantive violation of the Hobbs Act. The essence of the allegations was that Ingram and Brantley conspired together and that Brantley, aided by Ingram, extorted a total of $2,100 in cash from Theodore Dominic, an undercover F.B.I. agent.

posing as a wealthy entrepeneur from Cleveland, Ohio. Domine, who went by the name "Ted Spinoso" during the undercover investigation, told Ingram and Brantley that he wanted to run a large-stakes gambling operation in Jasper County. The indictment alleged that Domine paid Brantley so that Brantley would allow the gambling enterprise to operate in his county.

The indictment further alleged that Brantley and Ingram "knowingly and willfully . . . obstruct[ed], delay[ed] and affect[ed] commerce by extortion." The commerce alleged to have been obstructed was the gambling enterprise established by Domine; the interstate connection alleged in the indictment was that the gambling operation used equipment manufactured outside the State of South Carolina, involved the sale of

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liquor from outside the State and that its participants came from outside South Carolina. Both Brantley and Ingram were tried by jury in a trial that ended May 18, 1984. Both defendants were convicted of both the conspiracy and the substantive counts.

Thereafter the Petitioner and his Co-defendant appealed to the United States Court of Appeals. In an opinion filed November 7, 1985, the Court of Appeals reversed the convictions of the substantive offenses but affirmed the convictions on the conspiracy count. A Petition for Rehearing was timely filed. The Court of Appeals denied the Petition for Rehearing in an Order dated April 2, 1986.

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ARGUMENT IN FAVOR OF GRANTING WRIT

In a prosecution for conspiracy to violate 18 U.S.C. § 1951 (The Hobbs Act), must the government prove that the Petitioner's conduct had an actual or potential adverse impact on interstate commerce in order to establish federal jurisdiction?

The underlying purpose of 18 U.S.C. § 1951 (The Hobbs Act) is the protection of legitimate interstate commerce from extortion. Any taking of bribes by a public official, which could have no actual or potential affect on interstate commerce is a matter of purely local concern. Congress does not have the power to impose criminal sanctions unless the conduct complained of has at least a potential adverse affect on interstate commerce. Any prosecution

that does not serve to protect legitimate interstate commerce goes beyond the power and the intent of Congress.

The government, in its brief in the Court of Appeals, cited the case of United States v. Jannotti, 673 Fed.2d 578 (3rd Cir. 1982), for the proposition that the "depletion of assets theory" may establish the necessary connection with interstate commerce. The Court of Appeals affirmed the conspiracy convictions pointing out that, if the plan proposed by the F.B.I. undercover agents were put into effect, interstate commerce would be affected in that the interstate travel of gambling patrons from large northern cities would have an impact on public transportation, local hostelers, and local purveyors of food and drink.

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Thus, the government's jurisdictional argument, which was apparently adopted by the Court of Appeals, could be articulated as follows: because Domine, the undercover agent, would have to pay bribes to Sheriff Brantley, he would have to charge the customers of his Jasper County gambling establishment an entrance fee. Furthermore, because the patrons would have to pay Domine for the privilege of gambling in this establishment, they would have less money to pay for travel, lodging and food. Therefore, the gambling patrons might have to fly tourist class rather than first class; they might have to stay at cheap motels rather than expensive ones; they would have less money to spend on food and drink. In this way, the Sheriff's acceptance of bribes might possibly

Thus, the government's jurisdictional argument, which was apparently adopted by the Court of Appeals, could be articulated as follows: because Dominc, the undercover agent, would have to pay bribes to Sheriff Brantley, he would have to charge the customers of his larger County gambling establishment an entrance fee. Furthermore, because the patrons would have to pay Dominc for the privilege of gambling in this establishment, they would have less money to pay for travel, lodging and food. Therefore, the gambling patrons might have to fly tourist class rather than first class, they might have to stay at cheap motels rather than expensive ones; they would have less money to spend on food and drink. In this way, the Sheriff's acceptance of bribes might possibly

deplete assets that would otherwise be used in interstate commerce.

This argument, however, is fallacious. Surely it must be conceded that the fictional "high-rollers" from Cleveland, New York and Chicago would never grace the quiet streets of a small South Carolina town, were it not for the gambling operation that existed in the mind of the Petitioner. Under the government's view, such an operation could exist only with the protection of the Sheriff of Jasper County. Thus, under the government's view, the Petitioner's conspiracy was clearly a potential boon to interstate commerce: It is much better for the airlines to sell a tourist class ticket than no ticket at all. It is much better for interstate commerce that the hotels in

duplicate exacts that would otherwise be used in interstate commerce.

This argument, however, is fallacious. Surely it must be conceded that the district "high-rollers" from Cleveland, New York and Chicago would never grace the quiet streets of a small South Carolina town, were it not for the gambling operation that existed in the mind of the petitioner. Under the government's view, such an operation could exist only with the protection of the Sheriff of Dexter County. Thus, under the government's view, the petitioner's culpability was clearly a potential bona-fide interstate commerce; it is much better for one million to wait a fourteen dime ticket than no ticket at all. It is much better for interstate commerce that the hotels in

and around Hardeeville, South Carolina be occupied than to be vacant.

The Petitioner would thus concur in the finding of the Court of Appeals that interstate commerce would have been affected by the proposed gambling establishment. The Petitioner stresses, however, that commerce would in no way be adversely affected. The Petitioner would further concede that, by its terms, The Hobbs Act does not require that commerce be adversely affected. Certainly, however, the federal government has no interest in prosecuting a crime that has, either actually or potentially, only a favorable impact on interstate commerce. In fact, the federal courts have engrafted the word "adversely" into the meaning of The Hobbs Act. See 5th Circuit Pattern Instruction Number 33. Congress did not intend for

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The Hobbs Act to be employed by the federal government to usurp the powers of a state to prosecute a local official, where his conduct has an incidental favorable impact on interstate commerce. If the conduct attributed to the Petitioner took place, as the jury found, the real complaintants are the people of South Carolina, not the people of the United States of America.

The distinction between the instant case and United States v. Jannotti, 673 Fed.2d 578 (3rd Cir. 1982), can readily be seen. The defendants in Jannotti could have used the same argument that we make here: that by allowing a hotel to be built in the City of Philadelphia, they would have favorably, not adversely, affected interstate commerce. However, the defendants in Jannotti were faced with

the fact that a legitimate businessman has a right to conduct business without being concerned about whom he needs to pay off in order to do business. The Jannotti prosecution thus has the effect of protecting legitimate interstate commerce, which is the goal of The Hobbs Act. Here, the government is unable to point to any legitimate business that has been, or that conceivably could be, adversely affected by the Petitioner's conduct. Thus the instant prosecution does not involve "an area of federal concern delineated by the statute." United States v. Feola, 420 U.S. 671, 695 (1975).

The Court of Appeals also relied on the District Court case of United States v. Brooklier, 459 F.Supp. 476 (C.D. Cal. 1978). We can find no pertinent distinction between Brooklier

the fact that a legitimate businessman has a right to conduct business without being concerned about when he needs to pay-off in order to do business. The Jannotti prosecution thus has the effect of protecting legitimate interstate commerce, which is the goal of the Hobbs Act. Here, the government is unable to point to any legitimate business that has been, or that conceivably could be, adversely affected by the petitioner's conduct. Thus the instant prosecution does not involve "an area of federal concern delineated by the statute," United States v. Enmons, 410 U.S. 396, 399 (1973).

The Court of Appeals also relied on the District Court case of United States v. Brocklier, 439 F.Supp. 476 (C.D. Cal. 1978). We can find no pertinent distinction between Brocklier

and the instant case. Apparently the argument that we have presented here was not presented to the District Court in California. Furthermore, it is unclear from a reading of the Brooklier opinion whether the bogus corporation there was involved in legitimate as well as illegal commerce. Here it is clear that the proposed gambling establishment was engaged only in illegal commerce.

The prosecution in this case simply does not serve the purpose for which The Hobbs Act was passed: protection of legitimate interstate commerce.

CONCLUSION

The preservation of federalism is an important function of this Court. In an understandable effort to punish conduct, which a jury has found to have taken place, the Court of Appeals has, in counsel's opinion, expanded federal jurisdiction beyond the intent of Congress and beyond the scope of the Commerce Clause. We submit that the question presented by this Petition, putting a limitation on the concept of "effect on interstate commerce," is so substantial that a Writ of Certiorari should be granted.

Respectfully submitted,

WALLACE and TINKLER

BY: _____
ROBERT B. WALLACE

CONCLUSION

The preservation of federalism is an important function of this Court. In an understandable effort to punish conduct, which a jury was found to have taken place, the Court of Appeals has, in counsel's opinion, expanded federal jurisdiction beyond the intent of Congress and beyond the scope of the Commerce Clause. We submit that the question presented by this Petition, putting a limitation on the concept of "effect on interstate commerce," is of substantial that a writ of Certiorari should be granted.

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WALLACE and TUNELL

By: _____
ROBERT E. TUNELL

BY: _____
PAUL E. TINKLER

Attorneys for Petitioner

May 30, 1986

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5233

United States of America,

Appellee,

versus

Clifford Brantley,

Appellant.

No. 84-5234

United States of America,

Appellee,

versus

Henry E. Ingram, Jr.,

Appellant.

No. 84-6674

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Clifford Brantley and
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5213

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versus

Clifford Brantley,

Appellant.

No. 84-5214

United States of America,

Appellee,

versus

Henry E. Ingram, Jr.,

Appellant.

No. 84-5271

United States of America,

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versus

Clifford Brantley and
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Appeal from the United States District Court for the District of South Carolina, at Columbia. William W. Wilkins, Jr., District Judge. CR 84-56

Argued March 5, 1985

Decided November 7, 1985

Before HALL and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

---

Robert B. Wallace; Glenn B. Hester (Paul E. Tinkler: Wallace and Wallace; J. Robert Cooper; Law Offices of J. Robert Cooper on brief) for Appellant; John McIntosh, Assistant United States Attorney (Dale L. DuTremble, Assistant United States Attorney; Henry Dargan McMaster, United States Attorney; John R.

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Judges, and BUTZNER, Senior Circuit
Judge

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E. Tinkler; Wallace and Wallace); J.
Robert Cooper on brief, for Appellant; John
McIntosh, Assistant United States
Attorney (Dale L. Dutremble, Assistant
United States Attorney; Henry Dargan
McMaster, United States Attorney; John R.

McCravy, III, Third Year Law Student on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

The defendants were convicted of extortion in violation of the Hobbs Act, and of conspiracy to commit extortion in violation of that statute. Since the only claimed actual effect upon interstate commerce was pretensive activity by the FBI agents, we reverse the convictions of the substantive offenses but affirm the convictions on the conspiracy count.

I.

An FBI agent named Domine was sent from Cleveland, Ohio to investigate, in an undercover capacity, a report of corruption on the part of a state magistrate on Hilton Head Island, South Carolina. He pretended to be interested in opening and operating a gambling den,

McCrary, III, Third Year Law Student on brief, for Appellee.

HAYNSWORTH, Senior Circuit Judge:

The defendants were convicted of extortion in violation of the Hobbs Act, and of conspiracy to commit extortion in violation of that statute. Since the only claimed actual effect upon interstate commerce was preventive activity by the FBI agents, we reverse the convictions of the substantive offenses but affirm the convictions on the conspiracy count.

I.

An FBI agent named Domino was dent from Cleveland, Ohio to Wavertigata, in an undercover capacity, a report of corruption on the part of a state magistrate on Hilton Head Island, South Carolina. He proceeded to be interested in opening and operating a gambling den,

for which he would need some protection from law enforcement officials. He met the defendant Ingram who, among other things, owned and placed gambling devices known as poker machines. They discussed the possibility of Domine renting a vacant restaurant on Hilton Head Island and of insulating an illegal gambling operation from intrusion by law enforcement officials. It turned out that the vacant restaurant was unavailable on a short term basis, but Ingram, who had grown up in Jasper County, South Carolina and sometimes dabbled in real estate, told Domine of a vacant restaurant in Hardeeville, Jasper County, South Carolina, which he thought appropriate for Domine's purpose. Brantley, the sheriff of Jasper County, was a friend of Ingram's and Ingram assured Domine that Brantley would

protect the illegal gambling operation if paid $500 a month. Ingram also suggested that Domine give Brantley $200 during the first meeting to demonstrate his good intentions about later payments.

Domine and Ingram visited Brantley in his office in Ridgeland, the county seat of rural Jasper County. Domine explained his intention to rent the restaurant building and, once a month, bring in people from such cities as Cleveland, New York and Chicago for gambling at very high stakes. Brantley expressed approval of the proposal, though he insisted that local people not be involved. At the conclusion of the meeting, Ingram gave the sheriff $200 which Domine had provided for that purpose.

Domine rented the building on a monthly basis. Gambling tables and

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Domino rented the building on a monthly basis. Gambling tables and

equipment were brought down from the FBI training academy in Quantico, Virginia and installed in the club. Thereafter, once a month for the next four months, six to eight FBI agents were assembled at the club. They gambled, but with money supplied by the FBI. They consumed alcoholic beverages that had been provided by the FBI, and they "paid" for their drinks with money furnished by the FBI.*

In each of those four months, Domine met with Sheriff Brantley. He told the

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* The liquor at the bar was in large bottles. In South Carolina, licensed restaurants and lounges may sell alcoholic beverages for consumption on the premises, but only in mini-bottles, such as those used on the airlines. This "club" was unlicensed.

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sheriff that he was operating the gambling casino as he had planned and, each time, gave the sheriff $500. On more than one of those occasions, the sheriff stated that it was unnecessary for Domine to pay him anything, or that Domine owed him nothing, but he accepted the money on each occasion.

II.

Though what was done at the club was blatant sham, the government contends that it supplied the necessary effect upon commerce. The gambling equipment had been transported from Virginia. The whiskey had moved in interstate commerce for there is no licensed distillery in South Carolina. Some of the agents may have come from other states.

These, however, were not commercial transactions. The FBI transported its own gambling devices from Virginia to

South Carolina, but they were not the subjects of commercial transactions. The whiskey had moved in interstate commerce, but the FBI made no commercial use of it. It simply provided the assembled agents with free drinks. If the FBI's use of the whiskey had been reasonably necessary or appropriate, its previous movement in interstate commerce may well have supplied the jurisdictional effect upon commerce, but such an effect may not be found in pretense and contrivance. If some of the assembled agents came from other states, that was of no moment. See Rewis v. United States, 401 U.S. 808, 811-12 (1971). The fact is that nothing ever happened at the club except pretense.

One violates the Hobbs Act, 18 U.S.C. § 1951, when he "obstructs, delays, or affects commerce...[by]

extortion," and, by definition, the commerce affected must be interstate commerce or commerce with or within the District of Columbia or a United States territory or possession. Id. at § 1951(b)(3). The jurisdictional predicate may be satisfied though the impact upon commerce is small, and it may be shown by proof of probabilities without evidence that any particular commercial movements were affected. Thus, in United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), it appeared that the FBI had set up a corporation to solicit business cleaning public buildings in Baltimore, Maryland where corruption was suspected. The cleaning corporation actually received a contract to clean a public building, and, as required by the contract, it purchased and used a cleaning compound manufactured in Pennsylvania. It also leased and

brought into the state scaffolding necessary for the work. Use of the cleaning compound and the scaffolding were held enough to satisfy the commerce requirement. Id. at 671.

In United States v. Spagnolo, 546 F.2d 1117 (4th Cir. 1976), we held that an effect upon commerce could be proven by proof of probabilities. There, a co-owner of a construction firm had been forced at gunpoint to sell his half interest in the business. His removal as an officer of the business was held to have had such a probable effect on interstate commerce that the jurisdictional predicate was satisfied, though there was no attempt to prove that identified shipments in commerce were affected. Id. at 1119.

In those cases, however, there was a strong element of reality in the

commercial aspect of the activity. In Santoni, the contract required the purchase and use of a cleaning compound manufactured in Pennsylvania, and the necessary scaffolding was actually procured out of state. In Spagnolo, it was highly probable that the withdrawal of the "financial source" of the construction company would affect commerce in countless ways, for the effect of the conduct of such a business on commerce varies with the volume and nature of the construction work. There is nothing in those cases, however, to suggest that the necessary commercial connection may be shown by producing a child of fantasy.

It may be enough that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated. In

commercial aspect of the activity. In Santoni, the contract required the purchase and use of a cleaning compound manufactured in Pennsylvania, and the necessary scaffolding was actually procured out of state. In Reynolds, it was highly probable that the withdrawal of the "financial source" of the construction company would affect commerce in countless ways, for the effect of the conduct of such a business on commerce varies with the volume and nature of the construction work. There is nothing in those cases, however, to suggest that the necessary commercial connection may be shown by producing a child of fantasy.

It may be thought that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated. In

United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), with the help of a bribe of a city councilman, a zoning change was procured to permit the erection and operation of an animal hospital. Later, after obtaining bids on the construction, the owner concluded that construction of an animal hospital was not feasible, and the land was put to a use permitted by the earlier zoning. It was held that it was enough that commerce would have been affected if the project had been carried through to conclusion as contemplated when the zoning change was affected. In that case, of course, there was nothing pretensive about the representation of the owner; he simply had underestimated his projected costs when he procured the zoning change. That case does not

suggest that the requisite effect upon commerce may be found in pretense.

The Hobbs Act proscribes inchoate offenses as well as actual obstructions of commerce. When we come to the convictions on the conspiracy count, the perspective will not be the same, but we do not think the convictions of the substantive offenses may be sustained on the basis of the defendants' mistaken assumption that commerce would be affected. The defendants were the victims of false pretense, and the falsity induced the erroneous assumption. In those circumstances, what the defendants may have believed is too fragile a connection with commerce to supply the jurisdictional predicate for conviction upon the substantive charge of obstruction by extortionate means.

We are influenced by another consideration: that federal agents may not manufacture jurisdiction by contrived or pretensive means. In United States v. Archer, 486 F.2d 670 (2d Cir. 1973), the Court of Appeals for the Second Circuit held that a violation of the Travel Act, 18 U.S.C. § 1952, may not be shown when the jurisdictional predicate was an unnecessary interstate telephone call placed by one of the agents. The court held that when the jurisdictional predicate is based upon acts of undercover agents, the matter should be examined with greater than ordinary care, and that contrived activity by such agents may not satisfy the requirement. Id. at 681-82; c.f. United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977).

It was wholly unnecessary for the FBI to move gambling equipment from Virginia to South Carolina, or to have its agents pretend to gamble and to purchase whiskey. We do not think the commercial predicate for federal jurisdiction can be found in such pretense on the part of federal agents. Nor do we think the conviction for the substantive offenses may be sustained on any theory of the subjective intention of the defendants or the effect of their conduct on commerce if they themselves had not been the victims of false representations and the club had been opened and operated as the undercover agent had represented.

III.

The defendants were also convicted of conspiracy to violate The Hobbs Act, and in those convictions we perceive no

infirmity. The statute not only proscribes extortion affecting commerce; it expressly extends its prohibition to one who attempts or conspires to affect commerce by extortionate means. 28 U.S.C. § 1951(a).

As with other conspiracies, a conviction of conspiring to obstruct commerce in violation of The Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute. Though proof of some overt act in furtherance of the conspiracy may be required, proof that its purpose was accomplished is not. Unlawful conspiracies may be frustrated or aborted for a variety of reasons, including the intervention of law enforcement officials before the unlawful purpose is accomplished. Failure of its purpose, however, can never legitimatize an

unlawful conspiracy to commit a crime. Thus it was held in Ladner v. United States, 168 F.2d 771, 773 (5th Cir. 1948), that the defendants were properly convicted of conspiring to violate the predecessor of The Hobbs Act though the victim refused to pay the toll. See e.g. United States v. Jannotti, 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982), subsequent appeal 729 F.2d 213 (3d Cir.), cert. denied, 105 S.Ct. 243 (1984); United States v. Brooklier, 459 F.Supp. 476 (C.D. Cal. 1978).

In Jannotti, it appeared that undercover agents purporting to represent a fictitious Arab sheik represented to influential members of Philadelphia's city council that the sheik proposed to build a hotel of substantial size in Philadelphia, but that he would make no

unlawful conspiracy to commit a crime. Thus it was held in Ingram v. United States, 166 F.2d 135, 137 (5th Cir. 1948), that the defendants were properly convicted of conspiring to violate the predecessor of the Hobbs Act though the victim refused to pay the toll. See e.g. United States v. Iannucci, 671 F.2d 578 (2d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); subsequent appeal 729 F.2d 213 (2d Cir.), cert. denied, 105 S.Ct. 143 (1984); United States v. Brooklier, 459 F.Supp. 476 (E.D. Pa. 1978).

In Iannucci, it appeared that undercover agents purporting to represent a fictitious Arab sheik approached influential members of Philadelphia's city council that the sheik proposed to build a hotel of substantial size in Philadelphia, but that he would make no

commitment to the project unless he had in advance satisfactory assurance that he would encounter no problem in obtaining necessary zoning variances and automobile traffic re-routing and would not be hindered or delayed by unreasonable enforcement of building codes or regulations. The councilmen gave such assurances and accepted substantial payments in exchange for them.

Though the sheik and the proposed hotel were entirely fictitious, the majority of the en banc court held that the necessary effect upon commerce had been shown. The majority disclaimed a holding that the commercial connection could be found in the subjective intentions of the defendants that commerce be affected but, drawing on Staszcuk, concluded that "the defendants' conduct constituted a sufficient threat

to interstate commerce so as to implicate an 'area of federal concern' sufficient to give rise to federal jurisdiction." 673 F.2d at 592.

In Brooklier, 459 F.Supp. 476 (C.D. Cal. 1978), it appeared that the FBI had set up a shell corporation which purported to be engaged in the exportation of pornographic films to Mexico and South America. The indictment alleged that the defendants demanded and obtained $6,500, believing the victim to be a private corporation engaged in an illegal enterprise. The indictment charged them with an attempt to violate the Hobbs Act. The court denied a motion to dismiss and, in a comprehensive opinion, held that the defendants could be convicted of the attempt charge if the allegations of the indictment were proven. Commerce would have been affected if the

facts had been as the defendants believed them to have been, and the fact that an effect upon commerce was impossible in light of the true facts was no defense, since the defendants' misapprehension was a mistake of fact and not one of law. Id. at 479-82.

Upon a charge of a conspiracy or an attempt to violate The Hobbs Act, it is simply irrelevant that, because of facts unknown to the conspirators or to the actor, an actual effect upon commerce was impossible.

This is consistent with the general rule applicable to inchoate offenses. Though the circumstances may be misapprehended, if one "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be," the actor is guilty of a criminal attempt. Model

Penal Code, § 5.01(1)(a). The same principle is applicable when two or more persons conspire to engage in the conduct. The facts may be taken to be as the conspirators believed them to be.

In this case, there was abundant proof that Brantley and Ingram entered into a conspiratorial agreement to violate The Hobbs Act. Brantley accepted the initial extortionate payment from Ingram and subsequent ones from Domine. If the true facts had been as they believed them to have been, commerce would clearly have been affected.

This was not the case of a local enterprise that might now and then have been patronized by residents of other states. The scheme as described to the defendants was to bring down people from large northern cities for high stakes gambling. Patronage of non-residents was

to be sought, while local people were to be excluded from participation. Such an operation would have been the cause of interstate travel by many, if not all, of the patrons of the establishment. See Rewis v. United States, 401 U.S. 808, 813-14 (1971). That travel would have had an impact upon public transportation facilities and local hostelers. It would have occasioned the local consumption of food and drink, some of which would have moved in interstate commerce. The conduct in which the conspirators thought they were engaged would have had more than an adequate effect upon commerce to constitute a violation of The Hobbs Act. Brantley and Ingram were the victims of pretense in the description of the project, but that does not sanitize their purpose or their willing participation in a conspiracy to violate The Hobbs Act.

IV.

We find no merit in any of the other contentions of the appellants.

There was insufficient evidence of entrapment to warrant an instruction on the subject, and we perceive no error in any of the rulings of the district judge during the trial or in the denial of the motion for a new trial.

V.

For these reasons, the convictions on the substantive count are reversed while those on the conspiracy count are affirmed.

AFFIRMED IN PART;

REVERSED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5233

United States of America,

Appellee,

v.

Clifford Brantley,

Appellant.

No. 84-5234

United States of America,

Appellee,

v.

Henry E. Ingram, Jr.,

Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. William W. Wilkins, Jr., District Judge.

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Hall, Judge Murnaghan and Judge Haynsworth.

For the Court,

_____

Clerk

Nos. 85-2003 and 85-2150

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY E. INGRAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CLIFFORD BRANTLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' conspiracy convictions under the Hobbs Act, 18 U.S.C. 1951, were correctly sustained where petitioners' purported victims were actually federal agents and the object of the conspiracy was thus impossible to achieve.

2. Whether the Hobbs Act covers only extortionate conduct that adversely affects interstate commerce.

3. Whether the evidence was sufficient to support petitioner Ingram's conspiracy conviction under the Hobbs Act.

4. Whether the selection of the jury from a districtwide pool violated petitioners' rights under the Sixth Amendment or the Jury Selection and Service Act, 28 U.S.C. 1861 *et seq.*

5. Whether the district court erred by failing to instruct the jury on the law of entrapment.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2003

HENRY E. INGRAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-2150

CLIFFORD BRANTLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (85-2003 Pet. App. 39-57)[1] is reported at 777 F.2d 159.

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[1]Unless noted otherwise, all citations to "Pet. App." will refer to the petition filed in No. 85-2003.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1985, and a petition for rehearing was denied on April 2, 1986 (Pet. App. 58-59). The petitions for a writ of certiorari were both filed on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of extortion and one count of conspiring to commit extortion, both in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Ingram was sentenced to concurrent four-year terms of imprisonment on the two counts. Petitioner Brantley was sentenced to concurrent terms of imprisonment of five and seven years, respectively, on the two counts, and a $2200 fine. The court of appeals reversed petitioners' convictions on the substantive extortion count, but affirmed their convictions on the conspiracy count (Pet. App. 39-57).

1. The evidence at trial, as summarized in the opinion of the court of appeals (Pet. App. 41-44), showed that FBI Agent Theodore Domine was dispatched to South Carolina from the FBI's Cleveland office to conduct an undercover investigation of reported corruption on Hilton Head Island. Agent Domine posed as a gambler who was interested in opening and operating a casino, for which he needed the "protection" of local law enforcement officials. Petitioner Ingram, a local owner of gambling devices, suggested that the agent consider locating the gambling operation in a vacant restaurant in Hardeeville, a small town in Jasper County, South Carolina. Ingram said his friend, petitioner Brantley, was the sheriff of Jasper County and that Brantley would protect the gambling operation if he were paid $500 per month. Ingram also proposed that the agent give Brantley $200 at their first meeting as a gesture of good faith (*id.* at 42).

Ingram and Agent Domine subsequently visited Brantley at his office. Domine explained that he intended to rent the vacant restaurant in Hardeeville and, once a month, to invite persons from Cleveland, New York, and Chicago to gamble there at high stakes. Brantley approved the proposal but insisted that it not involve any local persons. At the conclusion of the meeting, Ingram handed Sheriff Brantley $200 that Agent Domine had given him for that purpose (Pet. App. 42-43).

After Agent Domine rented the vacant restaurant, he arranged for gaming tables and other gambling equipment to be delivered from the FBI training academy in Virginia. He also stocked a bar with liquor furnished by the FBI. Thereafter, six to eight FBI agents, posing as gamblers, assembled at the club once each month for the next four months. They gambled and purchased drinks with money supplied by the FBI. In addition, once each month Agent Domine met with Sheriff Brantley, reported that the casino was operating as planned, and paid the Sheriff $500 (Pet. App. 43-44).

2. Petitioners were convicted of both extortion and conspiracy to commit extortion. On appeal, the court of appeals reversed petitioners' convictions on the substantive count but affirmed their convictions for conspiracy.

The court of appeals reversed on the substantive count because it found that petitioners' acts of extortion had not actually affected interstate commerce (Pet. App. 45). Neither the liquor nor the gambling devices that the FBI transported to South Carolina were the subjects of commercial transactions, the court held. The prosecution had therefore failed to show that petitioners had obstructed, delayed, or affected commerce, within the meaning of the Hobbs Act, 18 U.S.C. 1951. Pet. App. 44-49. Relying on *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973),

moreover, the appellate court held that "federal agents may not manufacture jurisdiction by contrived or pretensive means" (Pet. App. 49). Thus, because "[i]t was wholly unnecessary [to the extortion scheme] for the FBI to move gambling equipment from Virginia to South Carolina, or to have its agents pretend to gamble and to purchase whiskey," the court of appeals found no effect on interstate commerce and thus no "commercial predicate for federal jurisdiction" (*id.* at 50).

With regard to the conspiracy convictions, the court of appeals reached a different conclusion. As with other conspiracy statutes, the court held, "a conviction of conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute" (Pet. App. 51). Thus, even though the object of the conspiracy could not be attained and the conspiracy therefore could have had no actual effect on interstate commerce, petitioners could still be guilty of conspiracy, as long as the unlawful agreement contemplated an effect on interstate commerce. In this case, the court of appeals noted, petitioners anticipated that the "[p]atronage of non-residents was to be sought, while local people were to be excluded from participation" in the gambling enterprise (*id.* at 55). Petitioners' agreement therefore contemplated a substantial effect upon interstate commerce. While petitioners may have been "the victims of pretense in the description of the project," the court concluded that that did not "sanitize their * * * willing participation in a conspiracy to violate the Hobbs Act" (*id.* at 56).[2]

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[2]The court of appeals also rejected the assertion that the district court should have instructed the jury on the law of entrapment, concluding that "[t]here was insufficient evidence of entrapment to warrant an instruction on the subject" (Pet. App. 56).

ARGUMENT

1. The court of appeals correctly upheld petitioners' Hobbs Act conspiracy convictions. Moreover, the court's decision is not in conflict with the decisions of this Court or any other circuit. Accordingly, further review by this Court is unwarranted.

The involvement of federal agents prevented petitioners from realizing the object of their conspiracy. Nevertheless, the court of appeals upheld petitioners' conspiracy convictions because their conspiratorial agreement contemplated conduct that "would have had more than an adequate effect upon commerce" (Pet. App. 56). Every circuit court that has considered this issue has reached the same conclusion: defendents may be convicted of violating the Hobbs Act even where, because of the involvement of federal agents, it is impossible for the defendants to carry out the object of the conspiracy. See *United States* v. *Holmes*, 767 F.2d 820 (11th Cir. 1985); *United States* v. *Brooklier*, 685 F.2d 1208, 1216-1217 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); *United States* v. *Jannotti*, 673 F.2d 578, 590-594 (3d Cir.), cert. denied, 457 U.S. 1106 (1982); see also *United States* v. *Rindone*, 631 F.2d 491 (7th Cir. 1980); *United States* v. *Frazier*, 560 F.2d 884 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

Petitioners contend, in essence, that a conspiracy to violate the Hobbs Act is no different from a substantive violation of that Act. If the substantive crime cannot be carried out because of the involvement of undercover agents, they argue, the government may not prosecute the unlawful agreement to carry out that substantive crime. But this claim overlooks the fact that the conspiracy and substantive provisions of the Hobbs Act constitute two separate crimes "composed of differing components" (*Callanan* v. *United States*, 364 U.S. 587, 597 (1961)). The distinction between a substantive offense and a conspiracy to commit it results in

many instances in which particular conduct can be prosecuted under one provision but not the other. See *Jannotti*, 673 F.2d at 593; *United States* v. *Rose*, 590 F.2d 232 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979) (conspiracy conviction affirmed despite the fact that involvement of FBI agents prevented theft of goods from taking place).

This Court made the same point in a closely analogous setting. In *Osborn* v. *United States*, 385 U.S. 323 (1966), an attorney sought to bribe a member of a jury panel in a prospective criminal case. Unbeknownst to the attorney, the person through whom he sought to pass the bribe was cooperating with federal agents. After his conviction, the attorney argued, as petitioners do here, that because of the involvement of federal agents the actual bribe scheme was "impossible of accomplishment" (385 U.S. at 332). Noting that the attorney had been charged simply with "endeavoring" to effect the bribe, this Court rejected the impossibility defense. Because the statute reached all "endeavors" to corrupt a juror, the Court found that it was unnecessary for the government to prove that there was some risk that the juror would actually be corrupted. It was enough that the defendant had the intent to commit the offense and took steps to realize this unlawful objective. *Id.* at 333. The same analysis applies to a prosecution for conspiracy; as long as the conspirators share an unlawful purpose and enter into an agreement to achieve that purpose, the offense is complete, regardless of whether there is any realistic likelihood that the object of the conspiracy will ever be attained.[3]

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[3]Petitioner nevertheless asserts (Pet. 20-21, 23) that the decision of the court of appeals sustaining his conspiracy conviction conflicts with the holding in *United States* v. *Mattson*, 671 F.2d 1020 (7th Cir. 1982). In *Mattson*, the Seventh Circuit overturned a Hobbs Act conspiracy conviction because "[t]he victim in th[at] case was an individual who had no connection with interstate commerce at all * * *" (671 F.2d at 1025). Mattson could not be charged with conspiring to violate the Hobbs Act because the bribe he accepted neither affected nor was

2. Petitioner Brantley, while conceding that "interstate commerce would have been affected by the proposed gambling establishment," insists that the venture would not have adversely affected commerce (85-2150 Pet. 12). Because in his view "the federal government has no interest in prosecuting a crime that has, either actually or potentially, only a favorable impact on interstate commerce" (*ibid.*), Brantley asserts that petitioners' conspiracy may not be prosecuted under the Hobbs Act.

As petitioner frankly acknowledges, this argument essentially asks the Court to "engraft[] the word 'adversely' into the meaning of the Hobbs Act" (*ibid.*). There is neither precedent nor warrant for restricting the scope of the Act in that fashion. The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce" (*Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). This Court has expressly refused to limit the broad reach of the Hobbs Act by reading into it qualifying language that simply is not there. In *United States* v. *Culbert*, 435 U.S. 371 (1978), the Court rejected the contention that conduct otherwise satisfying the elements of a Hobbs Act violation must also constitute "racketeering" in order to fall within the Act. The Court found that the statutory language did "not lend [itself] to restrictive interpretation" (435 U.S. at 373). Rather, the language "sweeps within it all persons who have 'in any way or degree * * * affect[ed] commerce * * * by robbery or extortion' " (*ibid.*, quoting 18 U.S.C. 1951(a)).

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meant to affect interstate commerce. By contrast, petitioners' agreement to extort protection money from Agent Domine contemplated that Domine's illegal casino would be patronized exclusively by gamblers from outside South Carolina. An effect on interstate commerce was therefore an integral part of the agreement in this case, but was no part at all of the agreement in *Mattson*. There is accordingly no conflict between the decision of the Fourth Circuit in this case and that of the Seventh Circuit in *Mattson*.

The Hobbs Act, on its face, covers all acts of extortion that "affect commerce." There is no textual basis on which to restrict the statutory language as Brantley urges. Moreover, the decision of the court of appeals is consistent with the decision in every other case that has addressed the issue. See, *e.g.*, *United States* v. *Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("[e]ven a beneficial effect on interstate commerce, *e.g.*, facilitating the flow of building materials across state lines, is within the prohibition of the statute"); *Jannotti*, 673 F.2d at 590; *United States* v. *Kuta*, 518 F.2d 947 (7th Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Staszcuk*, 517 F.2d 53, 58 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). Further review is unwarranted.

3. Petitioner Ingram asserts (Pet. 24-28) that the evidence supporting his conspiracy conviction was insufficient because the government failed to show that the conspiracy had "a probable effect on interstate commerce" (*id.* at 27). This claim, however, simply restates in another guise petitioner's initial contention that there cannot be a Hobbs Act conspiracy where the object of the scheme is incapable of being realized. As we noted above (see pages 5-7, *supra*), the conspiracy here plainly *contemplated* that there would be an effect on interstate commerce. The court of appeals so found, and its conclusion, based on this record, does not deserve further consideration.[4]

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[4]This Court's decision in *United States* v. *Feola*, 420 U.S. 671 (1975), from which petitioner quotes extensively (Pet. 25-27), is not to the contrary. There, the Court held that one may be guilty of conspiracy to assault a federal officer, in violation of 18 U.S.C. 371, without specifically knowing that the victim was a federal officer. In the course of its decision, the Court noted that while the defendant need not know the federal status of his victim, the government must nevertheless show that the defendant knew enough about his intended victim so that it may be fairly said that the "unfulfilled agreement to assault, * * * standing alone, constituted a sufficient threat to the safety of a federal officer so

4. Petitioner Ingram contends (Pet. 28-31) that the selection of his jury from the entire district of South Carolina, rather than from just the Charleston division, denied him his rights under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*

The Jury Selection and Service Act guarantees the random selection of juries "from a fair cross section of the community in the district or division wherein the court convenes" (28 U.S.C. 1861). Petitioner's jury was selected from a pool comprised of persons from the entire district. The jury selection system used in this case therefore complied with the plain terms of the Act.

Petitioner is equally mistaken in contending that the jury-selection process failed to provide a "fair cross section of the community" within the meaning of the Sixth Amendment. Petitioner does not dispute that his jury was selected from a "fair cross section" of the district. Nor does he assert that the trial court's decision to draw the jury pool from the entire district—rather than just the Charleston division—was somehow intended to deprive him of his rights. Petitioner simply contends that by drawing the jury from a statewide rather than a local pool, the trial judge caused "a substantial reduction of non-white qualified jurors" (Pet. 30). Even if true, this claim does not make out a violation of the Sixth Amendment. See *Savage* v. *United States*, 547 F.2d 212, 215-216 (3d Cir. 1976), cert. denied,

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as to give rise to federal jurisdiction" (420 U.S. at 695). Petitioner relies on this language to support his claim that there was insufficient evidence that the conspiracy in this case constituted enough of a threat to interstate commerce to provide federal jurisdiction. But petitioner misconstrues the quoted language from *Feola*. The Court simply stated that a conspiratorial agreement must contemplate conduct which, if realized, would satisfy the jurisdictional threshold; the court of appeals in this case concluded that this conspiracy met that test, and its decision on that point is amply supported by the record.

430 U.S. 958 (1977). By its terms, the Sixth Amendment requires only that the jury be selected from "the State and district wherein the crime shall have been committed." While the Sixth Amendment has been held to be satisfied by the selection of juries from only a single division within a district, see *Ruthenberg* v. *United States*, 245 U.S. 480, 482 (1918), there is obviously nothing wrong with a jury-selection system that complies with the strict terms of the Amendment by providing for juries to be selected from the entire district.

5. Finally, petitioner Ingram renews his claim (Pet. 32-36) that the district court erred by failing to instruct the jury on the law of entrapment.

In *United States* v. *Russell*, 411 U.S. 423 (1973), this Court observed that "entrapment is a relatively limited defense" and is available only to those defendants who have "committed all the elements of a proscribed offense, but [were] induced to commit them by the Government" (411 U.S. at 435). The courts uniformly hold that before a defendant is entitled to an entrapment instruction, he must first produce some evidence that the government induced him to commit the offense. See, *e.g.*, *United States* v. *Busby*, 780 F.2d 804, 806 (9th Cir. 1986); *United States* v. *Nations*, 764 F.2d 1073, 1079-1080 (5th Cir. 1985); *United States* v. *Rodgers*, 755 F.2d 533, 550-551 (7th Cir. 1985), cert. denied, No. 84-6500 (July 1, 1985); *United States* v. *Kakley*, 741 F.2d 1, 3 (1st Cir. 1984), cert. denied, No. 84-5341 (Oct. 9, 1984); *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Cf. *Lopez* v. *United States*, 373 U.S. 427, 434-435 (1963) ("before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged"). Reviewing the record in this case, the court of appeals concluded (Pet.

App. 56) that Ingram did not make a factual showing sufficient to merit an entrapment instruction.

While admitting that he had twice accepted cash from Agent Domine on behalf of Sheriff Brantley (4 Tr. 195, 204), petitioner Ingram never claimed that he was induced to do so. Rather, he repeatedly denied that he had joined a scheme to protect an illegal gambling operation, and he insisted that there was no connection between his acceptance of cash from Agent Domine and the operation of the casino (*id.* at 193-195, 204-205, 221-223, 231, 234, 239, 241). Ingram even professed surprise that the agent had given Brantley money (*id.* at 200). In short, as the court of appeals concluded, petitioner failed to adduce evidence sufficient to require an entrapment instruction to the jury.[5] The court's analysis of the record and its fact-bound conclusion warrant no further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Ingram cites only one part of the record as having sufficiently raised an entrapment defense—that in his own testimony at trial he had "explain[ed] that he did not understand why those actions [he had taken] were against the law" (Pet. 34). Plainly, that disclaimer has nothing to do with any alleged inducement by the government.